Supreme Court, U.S.
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No. 01-714

IN THE

Supreme Court of the United States

STATE OF UTAH, *et al.*,

Appellants,

v.

DONALD L. EVANS, *et al.*,

Appellees.

On Appeal from the United States District Court for the District of Utah

REPLY TO APPELLEES' MOTIONS TO AFFIRM

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Appellees' Motions to Affirm merely confirm the need for plenary review of the statutory and constitutional questions presented by Utah's challenge to the Bureau's use of "hot-deck imputation" in calculating apportionment. On the statutory question, appellees fail to offer any persuasive support for the district court's notion that Section 195 of the Census Act prohibits only "random" sampling, and thus does not extend to non-random sampling methods such as imputation. Nor do the appellees make any effort to dispute Utah's showing that this distinction would enable an end-run around this Court's decision in *Department of Commerce* v. *United States House of Representatives*, 525 U.S. 316 (1999). Appellees likewise offer no persuasive rebuttal to Utah's position on the constitutional question, which garnered four concurring votes in *House of Representatives* but was hastily cast aside below. Plenary review is thus plainly appropriate, as the Solicitor General implicitly concedes by failing to request either summary affirmance or dismissal for want of a substantial federal question.[1]

I. THE CENSUS ACT

As Utah demonstrated in its Jurisdictional Statement, two principal differences may be identified between the Bureau's imputation procedure and the statistical method struck down in *House of Representatives*. First, imputation was used to estimate a much smaller portion of the population. Second, it did so in a non-random fashion because, when enumerators were not able to determine the occupancy characteristics (or

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[1]North Carolina does move to dismiss on jurisdictional grounds, arguing that North Carolina's certificate of "entitlement" to 13 representatives (issued by the Clerk of the House of Representatives) is somehow final and unreviewable. NC Mot. 12. To the extent this argument goes beyond the justiciability argument that the district court correctly refuted (see JS App. 9-12), it amounts to nothing more than a dressed-up political question argument of the sort rejected in *Department of Commerce* v. *Montana*, 503 U.S. 442, 456-459 (1992).

in some cases, the mere existence) of non-responding units after six follow-up visits by census enumerators, the Bureau statistically estimated those characteristics by reference to a "sample" consisting of the nearest neighboring unit that was counted.[2]

Appellees now concede that the first distinction makes no statutory difference, as this Court made clear in *House of Representatives*. See 525 U.S. at 342.[3] Thus, appellees' statutory position ultimately boils down to the second distinction—that § 195 prohibits only *random* sampling and not the broader category of "sampling." Plenary review is warranted because this supposed distinction is contradicted by the plain language of the statute and by the Census Bureau's position prior to this litigation, and because Congress could not have intended to embrace a distinction such as this, which would render the statutory prohibition a nullity even as it creates added opportunities for political manipulation.

1. Appellees first contend that the term "sampling" is a "term of art" that would not be understood by statisticians to encompass hot-deck imputation. SG Mot. 11; NC Mot. 17.

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[2] Appellees do not dispute that the Bureau's own documents indicate that it intended to use the same "nearest-neighbor" approach utilized in hot-deck imputation in the proposed methodology struck down in *House of Representatives*. *See* Administrative Record ("AR") C01647-C01656 (setting forth the proposed method of assuming that each non-sampled unit had the same occupancy characteristics as its geographically closest sampled neighbor).

[3] Appellees do attempt to defend imputation by noting that it is "used only as a last resort after the failure of extensive direct efforts to collect occupancy information regarding a particular unit." SG Mot. 16; see also NC Mot 17-18. But appellees make no effort to explain how this "last resort" feature of hot-deck imputation insulates it from the statutory ban on sampling. Nor could they. This Court already has held that § 195 prohibits the use of sampling in "determin[ing]" the apportionment count, noting that "[w]hether used as a 'supplement' or as a 'substitute'" for an actual enumeration, "sampling is still used in 'determining'--that is, in 'the act of deciding definitely and firmly.'" 525 U.S. at 342.

Specifically, because imputation purportedly "does not incorporate the process of *deliberately* selecting a subset of the population *during the design phase* of a survey," the Solicitor General asserts that imputation survives under the statute. *Id.* at 13.

However, neither the language nor the logic of the statute can support a construction that would limit § 195's prohibition of "sampling" to only those statistical methods that involve the random, "deliberate selection" of sampled units "during the design phase of a survey." To the contrary, the Bureau's own 1997 Report to Congress unambiguously states that "statistical sampling" refers to a process that "'occurs *whenever* the information on a portion of a population is used to infer information on the population as a whole.'" Bureau of the Census, *Report to Congress—The Plan for Census 2000*, at 23 (Aug. 1997) ("*Census 2000 Report*") AR C00155 (emphasis added). The parties embraced this same definition in the Statement of Undisputed Facts. See Pls.' Statement of Undisputed Facts ("SUF") ¶ 24, *attached to* Pls.' Mem. in Supp. of Summ. J. ("Utah Mem.") (filed June 11, 2001).[4] As Judge Greene noted in his dissent, there can be no doubt that imputation qualifies as sampling under this (or any other) common-sense definition. See JS App. 32-33. It is a statistical method that uses "information on a portion of a population" to "infer information on the population as a whole." It does so by using occupancy data

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[4] Appellees also half-heartedly suggest that this definition does not encompass imputation, purportedly because the Census 2000 Report goes on to state that "[a]mong professional statisticians, the term 'sample' is reserved for instances when the selection of the smaller population is based on the methodology of their science." SG Mot. 14; NC Mot. 17. But there simply is no dispute that imputation, like other sampling methods, is "based on the methodology of the[] science" of statistics. Indeed, appellees repeatedly have acknowledged that imputation is a "statistical methodology" that relies on the statistical principle of "homogeneity." SG Mot. 9, 11; NC Mot. 18.

from observed housing units for the purpose of estimating the occupancy (or even existence) of unobserved units. See JS 14-15.

Indeed, the Solicitor General's Motion elsewhere adopts definitions that similarly encompass hot-deck imputation. For example, the Solicitor General offers textbook and dictionary definitions that define sampling as "'a method of selecting a fraction of the population in a way that the selected sample represents the population,'" or as an "'assessment of the quality or character of a whole by examination of a sample.'" SG Mot. 12. Yet the Bureau's imputation procedure clearly qualifies as a method of sampling under these definitions: it uses a "fraction of the population"—namely, the nearest neighbors to the addresses with missing data--to "represent" the unobserved portion of the population, *i.e.*, the addresses with missing data. *Id.* That procedure thereby enables the Bureau to estimate the size of the "whole by examination of a sample."[5] *Id.*; see also JS App. 33a (Greene, J., dissenting from judgment below).

2. The undisputed facts also demonstrate that any construction of § 195 that would limit its prohibition to deliberate or random sampling would nullify the statute and result in an absurdity. Indeed, appellees make no effort to refute Utah's showing that this distinction would leave the Census Bureau free to do exactly what this Court held that in *House of Representatives* that the Bureau could not do—to enumerate 90% of the population while using statistical methods to estimate the remainder. Under the opinion below,

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[5] It does so, to be sure, on an individualized, unit-by-unit basis, and not by means of an average. But this is only a difference in mathematical operations, and is not relevant to the above definitions. More fundamentally, the individualized nature of imputation does not distinguish that procedure from the procedure invalidated in *House of Representatives*. It is undisputed that, under that procedure, the Bureau planned to use nearest-neighbor imputation to estimate the occupancy characteristics of units randomly selected for estimation. JS 12.

the Bureau could accomplish this end-run around *House of Representatives* simply by devoting fewer resources to the non-response follow-up process and then estimating the predictably larger unenumerated segments of the population through hot-deck imputation or some other "non-random" sampling procedure. Congress could not have intended to embrace a distinction that would permit such easy nullification of the statute. See JS 15-16.[6]

Moreover, appellees' argument would ascribe to Congress not only the intention to permit nullification of § 195, but to do so in a particularly perverse way. The undisputed facts establish that random or "deliberate" sample-selection produces *more* reliable estimates than non-random procedures such as hot-deck imputation. SUF ¶¶ 33-35; JS 16 n.4. This is because randomly sampled units are likely to be representative of the estimated units, but units that responded to enumerators are not likely to be representative of the estimated units that did not respond after six visits.[7]

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[6] The Solicitor General is also incorrect in suggesting that Utah's reading of the term "sampling" would deprive the limiting phrase, "the statistical method known as," of any meaning. The Solicitor General does not dispute that there are many "statistical methods" in addition to random sampling and imputation. Thus, both terms can be included in the generic term "sampling" without doing violence to the statutory text.

[7] Appellees baldly assert in a footnote that "imputation can be more accurate than sampling," SG Mot. 18, n.5, but their cited authority neither supports this conclusion nor refutes the undisputed facts below. Instead, the documents cited by appellees merely establish (in their own words) that "housing units in a geographic proximity tend to be similar in size." *Id.* But this basic principle of homogeneity does nothing to refute the common-sense proposition that randomly selected units are more likely to be representative of the estimated population than units selected simply by virtue of their response during follow-up efforts. Indeed, it would be more reasonable to assume that units for which enumerators cannot acquire any data after six visits are likely either unoccupied or are not housing units at all (*e.g.*, a business, a storage unit, or even a typographical error on the

Accordingly, the district court's construction of the statute can be sustained only by attributing to Congress the absurd intent of permitting relatively unreliable methods of sampling while rejecting more reliable methods.[8] See JS 15-16.

3. Appellees have also failed to rebut Utah's showing that the Bureau's interpretation poses an enormous risk of political manipulation. Even if, with imputation, "neither the number nor the identity of the 'donor' or 'donee' units is pre-selected by the Bureau," SG Mot. 17, that does not eliminate the potential for manipulation. As demonstrated by unrefuted evidence below, the Bureau may alter the impact and extent of imputation by using different statistical methods or by altering the nature and extent of its followup procedures. See SUF ¶¶ 39-43. Moreover, given the potential for manipulation of both the number and types of addresses listed in the Bureau's Master Address File, the Bureau's new-found use of imputation to determine the "occupancy status" of an address with no known occupants by itself creates nearly unlimited potential for politically motivated mischief.

Even more significant, the Bureau's interpretation leaves the Bureau (and by extension the Secretary of Commerce and the President) the ultimate authority to decide whether to include *any* statistical adjustments in the final apportionment count. Since those conducting the census know at that point

master address file), and therefore quite unlike the responding units. *See* JS 16 n.4; SUF ¶¶ 33-35.

[8] Appellees are thus mistaken in denying that Utah has claimed that imputation "would reduce the accuracy of the apportionment counts." SG Mot. 28. In fact, Utah's experts offered essentially unrefuted testimony that, for reasons summarized above, the non-representative, non-random nature of the hot-deck method was likely to produce an overcount. SUF ¶¶ 33-35. Moreover, the Bureau itself has admitted that it does not know whether imputation has a positive or negative effect on distributive accuracy, which is the only accuracy that counts for purposes of apportionment. *See* Federal Defs.' Mem. in Opposition to Summ. J. ("DOJ Mem.") at 15, ¶ 35 (filed July 11, 2001).

what the impact of a statistical adjustment will be on apportionment, the prospect of political considerations entering into the decision is undeniable.

4. Appellees cannot escape these concerns—or the need for plenary review--by arguing that the Court should accord *Chevron* deference to the Bureau's use of hot-deck imputation. SG Mot. 20-21; NC Mot. 18-20; see *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). In the first place, it is undisputed that the Bureau dramatically altered its method of imputation in the 2000 census—using it for the first time to estimate the occupancy not only of houses known to be occupied (or at least known to exist), but also of houses whose very existence it had never established. SUF ¶ 18; JS 4-5. The use of imputation with respect to such households of unknown existence[9] was alone enough to shift the disputed seat from Utah to North Carolina, SUF ¶ 47, and thus there is no relevant historical practice that would permit the Court to stop short of reaching its own decision as to whether this method violates the Census Act.

In any event, deference even to the method of imputation employed by the Bureau in the previous four censuses is inappropriate. Obviously, § 195's unambiguous prohibition of the use of *any* statistical "sampling" must prevail over any contrary agency interpretation. *Chevron*, 467 U.S. at 842-43. Moreover, the Bureau's supposed interpretation of § 195 has no persuasive weight because, aside from the litigation context, the Bureau has never "expressly articulated [a] position at the administrative level as to the meaning and impact of" § 195. *Investment Company Inst.* v. *Camp*, 401

[9] The Bureau's sole basis for assuming such households into existence was their presence on the Master Address File, which is known to include many errors, including addresses that represent vacant lots, demolished buildings, storage units, businesses, and other non-residential structures. *See* JS 4.

U.S. 617, 627, 628 (1970). Accordingly, the Bureau has never expressly "satisfied" itself that the use of imputation in the apportionment count "w[ould] not violate" the Census Act. *Id.* Thus, the appellees' plea for deference merely heightens the need for plenary review by this Court.

II. THE CENSUS CLAUSE

The constitutional question set forth in Utah's Jurisdictional Statement is also plainly substantial. Indeed, appellees do not dispute that four members of this Court have already embraced the construction of the Census Clause put forward by Utah here, *House of Representatives*, 525 U.S. at 346-47 (Scalia, J., concurring), or that Utah has identified further textual and historical support for that view. Appellees' Motions to Affirm offer no persuasive response to the textual and historical grounds for this position. They do seek to introduce a few arguments not presented below, but those arguments are unpersuasive and in any event merely confirm the need for full briefing and argument on the merits.

1. The *only* definitions of "enumeration" presented to the court below resembled the historical definitions relied on by the four-Justice concurrence in *House of Representatives*, which define the term to mean a count effected "singly" or "number by number." 525 U.S. at 346-47; see JS at 20. In apparent recognition of the fact that imputation is incompatible with this understanding of the constitutional language, the Solicitor General cites an alternative definition that defines enumeration to refer to the "action of ascertaining the number of something." SG Mot. 22; see also NC Mot 28-29. Significantly, however, the definition identified by the Solicitor General comes from a *1933* edition of the Oxford English Dictionary. Thus, even after repeated opportunities for briefing on this question, appellees still have not identified *any* definition from the founding era that can be reconciled with the Bureau's use of statistical estimates.

Nor have appellees made any attempt to refute the extensive historical evidence that Utah presented to the

district court and summarized in its Jurisdictional Statement. This unrefuted evidence demonstrates that the generation of the Framers understood the difference between population counts derived even partially from estimates and those based solely on a person-by-person count, and that they consistently used the term "enumeration" in reference to the latter. Appellees offer a series of "structural" arguments in an effort to revive the district court's conclusion, SG Mot. 22; NC Mot. 28-29, but those arguments shed no real light on the issue and, in all events, would deprive the language of the Census Clause of its plain meaning.

2. Appellees' insistence that enumerators historically have relied on evidence other than their own firsthand observation, SG Mot. 23, 30; NC Mot. 28-29, likewise does nothing to undermine the historical understanding of an actual enumeration. This historical evidence merely suggests that an actual enumeration does not necessarily contemplate a physical "headcount" by the enumerator, but permits the enumerator to rely on individualized count data provided by heads of household or others who have themselves performed such an individualized count. This uncontroversial conclusion is hardly an indication that the Framers would have thought an actual enumeration could be performed by a mere estimate not rooted in any individualized count at all.

3. Appellees also mistakenly suggest that the "actual Enumeration" language in the Census Clause can be cast aside as a careless addition by the Committee on Style, and that the drafting history of that Clause indicates that the Framers were unconcerned with the "means of taking the census." SG Mot. 25; see also NC Mot. 23-25. From the outset of the debates on this Clause, the Framers' overriding concern was to provide a "permanent and precise standard" for the census. *See* 1 *Records of the Federal Convention of 1787*, at 578 (Max Farrand ed., rev. ed. 1966). This policy consideration arose in the context of the debate over whether to apportion representation on the basis of each State's

wealth, or on the basis of each State's comparative population. See *id.* at 582. Although an early proposal would have permitted apportionment "according to the principles of wealth & population," the wealth criterion was soon abandoned, primarily on the ground that any assessment of wealth would have introduced too much discretion. *Id.* William Paterson, for example, objected to a standard calling for an "estimate for the future according to the Combined rule of numbers and wealth as too vague." *Id.* at 561.

By requiring an actual count, the Framers ensured that apportionment would proceed on the basis of objective data, not subjective estimates. Appellees' attempts to brush aside the actual enumeration clause ignore both the plain language and the drafting history of the Census Clause.

4. Finally, appellees' attempts to question the significance of historical evidence presented by Utah are simply mistaken. It is not accurate to say that "at most the Framers distinguished between systematic empirical efforts to count the population" and "attempts to infer population figures from pre-existing data that had initially been compiled for other purposes." SG Mot. 30; see also NC Mot. 25. During the era of the Framers, Americans and Britons alike conducted partial enumerations in an attempt to derive estimates of larger populations, yet they consistently used the term "enumeration" to refer to actual counts and to prohibit the use of estimates in the apportionment count.[10] See JS 24-30.

CONCLUSION

For the foregoing reasons, the Court should note probable jurisdiction and reverse the judgment of the district court.

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[10] *See, e.g.*, 3 Jeremy Belknap, *The History of New Hampshire* 233-34 (1792) (discussing an early "survey" of the New Hampshire population conducted "partly by enumeration and partly by estimation"); *see generally*, *The Population Controversy* (D.V. Glass, ed., 1973).

Respectfully submitted,

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